

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

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)	
GENE L. ANDERSON,)	DOCKET NUMBER
Appellant,)	CH-0752-97-0149-I-1
)	
v.)	
)	
SMALL BUSINESS ADMINISTRATION,)	DATE: MAY 21, 1998
Agency.)	
)	
)	

Kevin A. Graham, Esquire, Flook & Graham, P.C., Liberty, Missouri, for
the appellant.

Ramona Powell, Denver, Colorado, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The appellant petitions for review of an initial decision that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we GRANT his petition for review, VACATE the initial decision, and REMAND the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

In a notice dated October 20, 1993, the agency informed the appellant of its decision to remove him for misconduct, effective October 22, 1993, from his GS-12 position of Regional Veterans Affairs Officer. Initial Appeal File (IAF), Tab 7, Subtab 4b, Exhibit 12(a). On October 22, 1993, the appellant requested voluntary retirement effective that day, stating that it was "time to move on" and that the veterans program under which he worked would "soon ... be eliminated." *Id.*, Exhibit 14 at 2-3. In accordance with the appellant's request, the agency effected the appellant's retirement effective October 22, 1993, in lieu of the previously decided-upon removal. *Id.* at 1. The Standard Form (SF) 50-B documenting the appellant's retirement stated:

REASON FOR RETIREMENT: TIME TO MOVE ON. VET[erans]
PROGRAM SOON TO BE ELIMINATED.

AGENCY FINDING: RETIRED AFTER RECEIVING WRITTEN
NOTICE ON 10/20/93 OF DECISION TO SEPARATE FOR
VIOLATIONS OF [specified statutory and regulatory provisions].

Id.

The appellant then filed a formal discrimination complaint, alleging that he was forced to retire because the agency improperly decided to remove him and that the agency's removal decision was discriminatory based on his age (60) and disability (depression). IAF, Tab 3 at 9-11; IAF, Tab 7, Subtab 4a. After the agency issued its final decision denying his discrimination claims, IAF, Tab 7, Subtab 4a, he timely filed this appeal, again asserting that the agency's removal decision was discriminatory based on his age and disability. IAF, Tab 1, Tab 3.

The administrative judge (AJ) issued an order informing the appellant that the Board may not have jurisdiction over the appeal because he retired before his removal was effected and that his retirement was not appealable unless it was involuntary; she afforded him an opportunity to submit evidence and argument to establish the Board's jurisdiction. IAF, Tab 8. After considering the appellant's

response to the jurisdictional notice, IAF, Tabs 12, 13, the AJ issued the initial decision, without holding the requested hearing, Initial Decision (ID), IAF, Tab 14. She dismissed the appeal for lack of jurisdiction, finding that the appellant failed to raise nonfrivolous factual allegations that, if proven, would establish that his retirement was involuntary,* and failed to establish a "direct causal link" between the agency's decision to remove him and his retirement. *Id.*

The appellant has timely filed a petition for review, arguing, inter alia, that he was entitled to appeal the agency's removal decision under *Mays v. Department of Transportation*, 27 F.3d 1577 (Fed. Cir. 1994). Petition for Review (PR), Petition for Review File (PRF), Tab 1. The agency has timely responded in opposition to the appellant's petition. PRF, Tab 4.

* The AJ, relying on *Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 688 (Fed. Cir. 1992), treated the alleged involuntariness of the appellant's retirement as an issue of whether the appellant stated a claim for which relief can be granted, rather than as a jurisdictional issue. ID at 2 & n.1. In *Spruill*, the court stated that an appellant's inability to establish the involuntariness of his resignation constitutes a failure to establish "a key factual element of his cause of action" and not a failure to establish the Board's jurisdiction. *Id.* This statement in *Spruill* was dicta, however, and has not been followed by the court or the Board, which have subsequently treated the involuntariness of a retirement or resignation as a jurisdictional issue, as required by the court's *en banc* decision in *Cruz v. Department of the Navy*, 934 F.2d 1240, 1248 (Fed. Cir. 1991) (the Board properly dismissed the appellant's appeal of his resignation for lack of jurisdiction when he failed to prove it was involuntary). See *Braun v. Department of Veterans Affairs*, 50 F.3d 1005, 1008 (Fed. Cir. 1995); *Hernandez v. U.S. Postal Service*, 74 M.S.P.R. 412, 416 (1997). Thus, we find that the AJ should have dismissed for lack of jurisdiction the appellant's claim that his resignation was involuntary. However, we find no basis to disturb the AJ's analysis of the substance of the appellant's claim of involuntary resignation.

ANALYSIS

Section 7701(j), 5 U.S.C., provides:

In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal Statute nor any election made by such individual under any such system may be taken into account.

In *Mays*, 27 F.3d at 1579-81, the court construed section 7701(j) as granting Mays a right to appeal the agency's decision to remove her, even though the removal was never effected because she retired in lieu of removal. We agree with the appellant's argument on review that the facts here are materially the same as those in *Mays* and that the Board therefore has jurisdiction to review the agency's decision to remove him. See *Black v. Department of the Air Force*, 76 M.S.P.R. 559, 562-63 (1997); *Richards v. Department of Veterans Affairs*, 74 M.S.P.R. 17, 20 (1997); *Tizol-Coimbre v. U.S. Postal Service*, 70 M.S.P.R. 382, 384 (1996); *Moore v. U.S. Postal Service*, 70 M.S.P.R. 357, 359-60 (1996); *Scalese v. Department of the Air Force*, 68 M.S.P.R. 247, 248 (1995); *Williams v. Equal Employment Opportunity Commission*, 64 M.S.P.R. 436, 439-40 (1994).

The AJ found that *Mays* requires a "direct causal link" between the agency's decision to remove the appellant and his retirement and that there was no such link here because the appellant indicated on his request for retirement that he was retiring for reasons unrelated to the removal decision. ID at 6. Our review of *Mays* indicates that it did not turn on the existence of a "direct causal link" between the agency's removal decision and the appellant's retirement. Rather, it was predicated on the language and legislative history of section 7701(j), indicating that an employee should not be forced to choose between electing to receive his retirement benefits and appealing the agency's decision to remove him. *Id.* at 1579-80.

In any event, it is clear that the appellant's retirement was related to the agency's removal decision. The appellant requested to retire two days after the agency issued its removal decision. The timing of the appellant's request to retire and the agency's finding on its SF 50-B that the appellant retired after receiving written notice of the removal decision tend to suggest a causal link between the request and the agency's removal decision. *See Mays*, 27 F.3d at 1580. Although the appellant listed reasons other than the removal decision in requesting to retire (that it was time to move on, etc.), such stated reasons could suggest that he, understandably, did not want his personnel records to reflect that he retired to avoid being removed for misconduct. We therefore find, contrary to the AJ's finding, that such stated reasons do not necessarily negate the existence of a causal link between the agency's removal decision and the appellant's retirement. In addition, contrary to the AJ's statement that "[b]y writing the more benign reason on his SF-52, the appellant secured for himself the advantage of having his OPF [official personnel file] reflect a non-disciplinary reason for leaving his position," ID at 7, as noted, the agency stated on his SF 50-B that he retired after receiving written notice of the decision to separate him.

ORDER

Accordingly, we remand this appeal for further proceedings. On remand, the AJ shall afford the appellant an opportunity for the hearing he requested and shall adjudicate the merits of the agency's removal decision.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.